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FEB 20 1985

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC
Office of the Secretary

In Re Application of

Shurberg Broadcasting of Hartford, Inc.

For the License of Station WHCT-TV
Hartford, Connecticut

831202KF
File No. BPCT-83120KF

To: James C. McKinney
Chief, Mass Media Bureau

REPLY TO OPPOSITION TO MOTION TO DISMISS

Astroline Communications Company Limited Partnership ("ACC"), through counsel, hereby tenders its Reply to the Opposition to Motion to Dismiss filed by Shurberg Broadcasting of Hartford, Inc. ("SBH") regarding the above-captioned application for the construction permit for a new television station to operate on Channel 18 in Hartford, Connecticut.

For the reasons discussed in detail below, ACC's Motion to Dismiss should be granted or, in the alternative, SBH should be ordered by the Federal Communications Commission ("Commission") to supply, within seven days, information (promised over 14 months ago) concerning its financial qualifications. This supplemental disclosure, which is prescribed by the Commission's Rules and recent case law, should include a detailed description of the alleged source of SBH's financing, the identity of the undisclosed individual secretly backing SBH and other information regarding the terms of the proposed financing. Failure to do so within seven days of the Commission's Order should result in the dismissal of SBH's application.

I. Introduction.

On January 31, 1985, ACC filed a Motion to Dismiss SBH's application on the grounds that it is not financially qualified to become a Commission licensee. ACC's Motion was largely based upon an affidavit filed with the United States Court of Appeals

for the District of Columbia Circuit ("Court of Appeals") by Alan Shurberg, President and sole stockholder of SBH, who swore that denial of SBH's Emergency Motion for Stay would irreparably harm SBH by causing it to lose all of its financial support from its single source of financing which is essential to the prosecution of its application and appeal before the Commission and the Court of Appeals. On December 21, 1984, the Court of Appeals denied SBH's Stay. Nearly 60 days have passed, and SBH repeatedly has failed to re-establish its financial qualifications.

On February 7, 1985, SBH filed an Opposition to ACC's Motion to Dismiss. In its Opposition, SBH raises more questions concerning its financial status than it answers, makes a mockery of the Commission's reporting requirements, establishes additional grounds for dismissal of its application and invites the Commission to compel SBH to submit specific documentation concerning its financial qualifications.

II. SBH has consistently and repeatedly represented that it is fully qualified to be the Commission's licensee for Channel 18.

Initially, in its Opposition, SBH argues that ACC incorrectly alleged that SBH represented itself to be financially qualified. Specifically, SBH asserts that ACC incorrectly interpreted SBH's statement that its "[f]inancial certification [is] to be supplied." Later, in its Reply, SBH cleverly attempts to straddle the fence by stating that it "is financially qualified and it . . . is not financially qualified." Reply at ¶5.

ACC admits having difficulty interpreting SBH's statement because of its ambiguous and evasive draftsmanship. The declaration is not a grammatical sentence and is actually meaningless in the context of a financial certification. In an effort to interpret the vacuous representation, ACC examined the unequivocal statements made by SBH throughout the course of this proceeding. SBH has always purported that it was and continues to be "fully qualified" to receive the construction permit for Channel 18. In its Petition for Extraordinary Relief filed on April 19, 1984, SBH referred to itself as an applicant "ready, willing and able to begin operation of the station." Petition at 15.

(emphasis added). In that same pleading, SBH continually refers to itself as "a qualified applicant." Petition at 21.

In its Petition for Leave to Intervene filed on May 14, 1984, counsel asserted that SBH is "a qualified licensee sensitive to the needs and interests of the Hartford area." In its Consolidated Comments filed on July 23, 1984, SBH asserts, variously, that if the comparative hearing were held and Faith Center, Inc. found to be an unacceptable licensee, "the Commission will have available to it the comparative applicant [SBH] "ready, willing and able to better the incumbent's performance" Comments at 44. SBH continued its claims in that pleading by asserting that it is "a fully qualified applicant . . . [a]nd, if SBH is granted the construction permit, the Commission need not be concerned about possible delays in the construction of the station and initiation of SBH's service to Hartford." Comments at 54.

Thus, from the above statements, it is clear that SBH has consistently represented itself as being fully qualified which, de verbo in verbum, includes SBH being financially qualified. Although it may now want to, SBH cannot walk away from these statements which are part of the overall record in this proceeding, nor can it walk away from its earlier cited statements contained in an affidavit before the Court of Appeals. SBH's attempts to create a "now you see it, now you don't" argument concerning its financial qualifications is patently shallow, undeniably self-serving and absolutely ridiculous.

SBH also has ignored the legal and factual analysis applied by the Commission when reviewing a Motion to Dismiss. It is an elementary rule of law that questions of fact asserted in a Motion to Dismiss are to be construed in the light most favorable to the non-moving party. 5 C. Wright & A. Miller Federal Practice and Procedure, § 1357 (1969). Thus, in interpreting SBH's vague statement in Section III of its 301 application, counsel for ACC assumed facts most favorable to SBH. Specifically, ACC interpreted SBH's statement ("financial certification to be supplied") in a light most

favorable to SBH, and, therefore, concluded that SBH was (at least at one time), financially qualified. Thus, ACC properly relied upon specific representations of SBH and followed basic legal principles applying to Motions to Dismiss when it interpreted SBH's statement as an affirmative financial certification.

ACC now stands corrected. Apparently, SBH was not financially qualified when it filed its application in December 1983, was not financially qualified when the Court of Appeals denied its Stay in December 1984 and is presently is not financially qualified.

III. SBH's application should be dismissed for failure to establish its financial qualifications.

SBH next argues in reply that a "fundamental flaw" in ACC's Motion is ACC's assumption that the Commission will dismiss an application when the applicant fails to establish its financial qualifications. Reply at ¶ 8. SBH correctly states that the Commission is reluctant to employ draconian procedures against applicants that display due diligence but nevertheless have routine defects in their application. SBH, however, continued repeatedly to refuse to supply the promised information. This unexplained 14-month delay which makes a mockery of the Commission's reporting requirements compounds SBH's problem beyond the typical proportion and makes its application subject to dismissal.

The Commission recently announced its policy for processing incomplete and patently defective construction permit applications. This policy was adopted because:

[i]ncomplete and patently defective applications place an inordinate burden on our processing staff. This burden entails repeated requests by the staff for information clearly called for in the application. This delays the processing of not only the incomplete and patently defective applications, but also the processing of grantable applications. Most important, service to the public in the initiation of new broadcast service is delayed."

Public Notice, FCC-84-366 (August 2, 1984) at 1.

In situations where an applicant fails to "answer a question" clearly called

for in the application and such an omission "impair[s] [the Commission staff's] ability to evaluate the application, the application will be subject to dismissal." Id. at 3. See also George E. Cameron, Jr., Communications, 53 RR 2d 917, 930 (1983) (failure to report significant changes in financial position constitutes disqualifying actions).

In an attempt to persuade the Commission that its application should not be dismissed, SBH lists numerous cases, all of which are inopposite to the facts and circumstances of the instant case. The absence of any legal analysis of the 24 cases string cited in SBH's brief curiously suggests that each is easily distinguished from this unique case.

A case that SBH neglects to cite that is strikingly analogous to this case is Central Alabama Broadcasters, Inc., 55 RR 2d 1637 (Rev. Bd. 1984). This case, like the present one, involved a television renewal proceeding where the opponent, a sole party, had originally certified his financial qualifications on the application, but "subsequently amended his application by withdrawing his certification." Id. at 1638.

The licensee moved for summary decision and dismissal of the opposing party's application. The Administrative Law Judge ("ALJ") granted the licensee's motion finding that the opposing applicant "offered no evidence whatever that he would provide the necessary financing for his proposal." Memorandum Opinion and Order, FCC 83M-4461 (December 1, 1983). The Review Board affirmed the ALJ's dismissal of the opposing application. Central Alabama Broadcasters, Inc., 55 RR 2d 1637, 1638 (1984).

By analogy, SBH's application should be dismissed. Alan Shurberg's sworn affidavit can properly be construed as a withdrawal of any financial certification that earlier may (or may not) have been made. SBH's attempted reliance upon similar, vague statements in other 301 applications filed in other proceedings is inappropriate. In Central Alabama, the Review Board noted that the opposing party's application would be dismissed "not withstanding his claim that his financial showing was no less objective than many other applicants' certification claims." Id. at 1637.

IV. Alternatively, SBH should be ordered to produce specific documentation of its financial qualifications within seven days.

Clearly, SBH has not, as of this date, offered any indication that it is financially qualified to become a Commission licensee. If the Commission decides not to dismiss SBH's application on this basis, it may, alternatively, provide SBH one last "additional opportunity to demonstrate its financial qualifications" to which SBH alluded to in its Opposition. Opposition at ¶8. This relief is specifically prescribed by the Commission's Rules. 47 C.F.R. § 73.3566(b). Specifically, the rule authorizes the Commission's staff to require an applicant:

to file any additional documents or information not included in the prescribed application form . . . a failure to comply with such request will be deemed to render the application defective, and such application will be dismissed.

ACC suggests, however, that before this time-consuming proceeding continues any further, the Commission limit the opportunity provided to seven days from the release of its Order. Otherwise, ACC, the Commission and the Court of Appeals could waste a tremendous amount of resources litigating frivolous matters with a party (SBH) that lacks the financial qualifications to build and operate the contested station.

There is clear precedential support for the underlying assumption that broadcast applicants may not ad infinitum delay indicating whether or not they are qualified financially. In Coastal Bend Family Television, Inc., 94 FCC 2d 648 (Rev. Bd. 1983), an applicant waited 19 months after its financial status was put in doubt before tendering a curative amendment supplying documentation of its financial activities. The Review Board rejected the amendment, stating that the applicant had delayed too long before producing any financial information, and with "absolutely no source of financing for its proposed station, its application would have been dismissed as patently defective." 47 C.F.R. § 73.3566. The applicant in Coastal Bend had originally supplied documentation of its financial qualifications which were subsequently determined to be invalid by the applicant itself. Conversely, for 14 months, SBH has avoided even an

initial declaration of financial wherewithal and then nearly 60 days ago created additional speculation concerning its financial qualifications by submitting the sworn affidavit to the Court of Appeals. Clearly, the Commission has every right now to order SBH to resolve this confusion which SBH created by its ambiguous and obscure statements in its 301 application and its explicit and definitive statements concerning the withdrawal of its financial support in its affidavit at the Court of Appeals.

Where an applicant initially submits information which is insufficient to establish its financial qualifications (as SBH has done), it must meet its burden of making a complete and detailed financial showing. See South Florida Broadcasting Co., Inc. 94 FCC 2d 452 (1983). In South Florida, the Commission overturned the previous policy announced in Minority Broadcasters of East St. Louis, Mimeo No. BC-5092 (July 15, 1982), stating that its substantive financial standards have not been changed in that all applicants must be capable of constructing and operating their proposed stations for three months. When insufficient financial information is submitted at the outset by the applicant, a substantial and material question of fact arises. Thus, the applicant may not simply avoid its obligations to clear up its financial problems by "certifying" that it is financially qualified. Id. at 454.

Whereas there is clear evidentiary support for the presumption that SBH is not financially qualified (Shurberg's affidavit) and apparently may not have been for 14 months, the burden is now placed on SBH to cure the patent defect in its application. ACC submits that seven days is a reasonable amount of time for SBH to disclose the information upon which it will rely in showing that it is financially qualified. In eliciting the necessary information and documentation from SBH, the Commission should specify exactly what information is required from SBH. ACC suggests, at a minimum, that SBH be required to identify the individual who SBH purports to be its "single source of financing" and produce tax records and other documentation concerning the financial strength of that undisclosed person. Also, all written agreements between SBH and its

secret backer should be produced. This information, at a minimum, is needed for the Commission to be able to properly assess whether SBH could construct and operate the proposed station for three months.

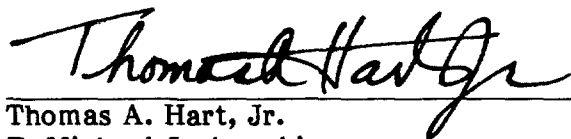
V. Conclusion.

The immutable fact remains that SBH has never established (as it concedes) its financial qualifications to become a Commission licensee. This fact in and of itself serves as a legitimate basis for the Commission to dismiss SBH's application given the protracted length of time SBH has failed to supply the promised financial certification.

Assuming, arguendo, that the Commission decides to bestow upon SBH some additional time to rehabilitate its financial proposal, only a limited period of seven days from the release of the Commission's Order disposing of the instant motion should be provided. If SBH cannot provide a detailed and specific description of the alleged source of its financing, including the identity of the undisclosed person providing the funding, and other information relating to the terms of the financing, then the Commission should dismiss SBH's application with prejudice.

Respectfully submitted,

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February 20, 1985

CERTIFICATE OF SERVICE

I, Cynthia D. Hamm, do certify that a copy of the foregoing Reply to Opposition to Motion to Dismiss was served first-class, postage prepaid on this 20th day of February 1985 addressed as follows:

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